IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 600 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? NO.

2. To be referred to the Reporter or not? NO.

J

3. Whether Their Lordships wish to see the fair copy of the judgement? NO.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? NO.

5. Whether it is to be circulated to the Civil Judge? NO.

MANOJKUMAR AMRUTLAL MEHTA

Versus

STATE OF GUJARAT

Appearance:

MR KETAN D SHAH for Petitioner

PUBLIC PROSECUTOR for Respondent No. 1

MR PN BAVISHI for Respondent No. 2

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 21/08/98

C.A.V.JUDGMENT :

1. The petitioner who is the original accused has filed this Criminal Revision Application under Section 397 of the Code of Criminal Procedure (to be referred to

as " the Code ")challenging the order dated 24-11-97, passed by the learned Judicial Magistrate, First Class, below application Exh.7, which was filed for discharge in Criminal Case No.816/97.

2. Brief facts leading to the filing of this Revision Application may summarize as under :

The respondent No.2 is carrying on business of grocery in the town of Idar. The petitioner is dealing in business of foodgrains and oil seeds at village Nava Bhaga, Tal. Khedbrahma, Dist : Sabarkantha. As the petitioner was in need of money, he had taken a loan of Rs.70,000/- from the respondent No.2 (to be referred to as "complainant"). The petitioner at the time of taking the loan had promised to the complainant that he would pay the amount of Rs.70,000/- latest within two months. As per the version of the complainant, the petitioner did not pay the amount of Rs.70,000/- within two months, and therefore, the complainant demanded the said amount on various occasions. At last the petitioner issued a cheque bearing No.2568, dated 20-4-96 of the amount of Rs.70,000/-, of Idar Nagrik Sahakari Bank Ltd. Idar, to the complainant. When the said cheque was presented in the Central Bank of India, Idar, it came to be dishonoured by intimation dated 3-5-96 of the Bank with an endorsement of "insufficiency of funds ". As per the say of the complainant, after the intimation about of the dishonour of the cheque, he served a notice dated 17-5-96 through his advocate by Registered Post to the petitioner, which according to the complainant was not returned either served or unserved. As per the say of the complainant, the envelope containing the notice was lost by the Postal Department. The complainant in the complaint has stated that as per his information, the petitioner was not available at his native place at village Nava Bhaga. It is stated that when the petitioner returned to his native place, the complainant through his advocate on 1-5-97 sent a notice by registered post, which the petitioner had refused to take and hence the registered envelope was returned with the endorsement " refused " on 14-5-97. Thereafter, the complainant waited till 25-9-97 and as the petitioner failed to pay the amount of the dishonoured cheque, he filed the complaint on 25-6-97 in the Court of learned Judicial Magistrate, First Class, Idar,against the petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act- 1881 (to be referred to as the Act.)

3. The learned Judicial Magistrate First Class, Idar, after due verification of the complaint issued

summons against the petitioner for the offence punishable under Section 138 of the Act. The petitioner filed an application Exh.7 presumably under Section 239 of the Code for discharge, inter-alia contenting that the complaint was time barred as it was filed beyond the period of limitation prescribed under the Act. In the application it was averred that the cheque in question was dishonoured on 3-5-96, whereas the notice under Section 138 (b) of the Act was served on 1-5-97 and hence the complaint was time barred. It is further averred in the application that the complaint did not satisfy the ingredients of Section 138 of the Act, and therefore, the petitioner deserves to be discharged.

4. The learned Judicial Magistrate,First Class, Idar, after hearing the learned advocate of the petitioner and the respondent No.2-original complainant vide his order dated 2-11-97 rejected the application Exh.7 which was filed for discharged by the petitioner, which is challenged by the petitioner by way of filing this Criminal Revision Application in this Court.

5. Learned advocate for the petitioner has submitted that after the cheque in question was dishonoured, the complainant sent a notice to the petitioner on 17-5-96, but acknowledgment or the registered envelope was not received by the complainant either served or unserved and hence the notice must be deemed to have been served as per the provisions of Section 27 of the General Clauses Act. It is further pleaded by the learned counsel for the petitioner that when the notice after the dishonour of the cheque was sent by registered post at the correct address of the petitioner, its miscarriage in post will not render the notice invalid.

6. It is further pleaded by the learned counsel for the petitioner that second notice cannot create new cause of action as the first notice is a valid notice and as per the provisions of Section 94 of the Act, it should be held that it was a valid service on the petitioner. In light of the above facts, it is pleaded that the complaint is not maintainable as it is filed beyond prescribed period of limitation as contained in Section 138 and 142 of the Act and the Revision Application deserves to be allowed and the complaint should be quashed.

7. Learned counsel for the respondent No.2 has submitted that the complaint lodged by the respondent No.2 is within the period of limitation as the cause of action had arisen only on June 14, 1997, when the

petitioner received the statutory notice as prescribed under Section 138 (b) of the Act. It is pleaded that the first notice was not served on the petitioner, and therefore, no cause of action had arisen on the issuance of the first notice. It is further pleaded that as per the provisions of Section 142 (b) of the Act, the complaint for dishonour of the cheque can be filed within one month from the date on which the cause of action arises under Clause (c) of the proviso to Section 138 of the Act. Learned counsel for the respondent No.2 stressed that the cause of action only arises when the drawer of the cheque fails to make the payment of the amount of the dishonoured cheque within 15 days of the receipt of the notice. Lastly it is pleaded by the learned counsel for the respondent No.2 that the question whether the complaint is time barred or whether the first notice was served or not and whether under what circumstances the registered envelope was lost by the Postal Department is a disputed question of fact which can only be decided when the parties lead evidence during the trial, and therefore, the Court should not interfere with the disputed question of fact and the application may be rejected.

8. In light of the rival submissions of the learned advocates appearing for the petitioner and respondent No.2, the questions arise for consideration are whether there was valid service of first notice on the petitioner which was sent by the complainant and the envelope of which was lost by the postal department and whether the complaint is time barred in view of the provisions of Section 138 read with Section 142 of the Act ? To determine the abovereferredto questions it would be convenient to refer to provisions of Section 138 and 142 of the Act which read as under :

138 Dishonoured of cheque for insufficiency, etc.of funds in the account Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either, because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with

imprisonment for a term which may extend to one year, or with fine which may extent to twice the amount of the cheque, or with both :

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been resented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier :

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount or money by giving a notice in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid ; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation :- For the purpose of this Section, "debt for other liability " means a legally enforceable debt or other liability.

142 Cognizance of offence- Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (2 of 1974),-

(a) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque ;

(b) such complaint is made within one month of the date on which the cause of action arise under clause (c) of the proviso to Section 138 ;

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138.)

9. From the above quoted provisions, it becomes clear that under the provisions of Clause (c) of Section

138 of the Act, the cause of action for the filing of complaint arises on the failure of the drawer " to make payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice " given under Clause (b) thereof and not before that. No complaint can, therefore, legally be filed before the abovesaid period. That being so, the material and the relevant date for the accrual of the cause of action for such complaint is the date of receipt of such notice by the drawer. There are number of ways of the service of the legal notice as envisaged under Section 138 of the Act. Notice can be served either by personal service taking the acknowledgment of the same or through postage. In the case of service of notice by the postage, there are several ways for the purpose. It can be sent through the registered post, through the registered post accompanied with the A.D., general delivery or through the U.P.C.. However, if the accused denies the service of any notice to him, it is difficult to prove the same in case of general delivery by post as there is no evidence led for the purpose except the statement of the person sending the notice. In the case of service of notice through registered post A.D. or the U.P.C. it is not that difficult. Atleast it can be said that notice was really served on the accused. Once it is concluded that the notice was served through registered post and the receipt thereof is brought on record, it is the presumption that the notice has been duly served on the accused. In the case of notice sent by U.P.C., there is a presumption that unless it is returned to the sender, it is reached the addressee within a reasonable time. Normally as far as the service of notice is concerned, the same has to be served specifically to the person against whom the prosecution has to be launched. However, in certain cases, presumption of service of notice can be raised. In a case where after the dishonouring of the cheque, the notice is issued under Section 138, and the same is received back with the endorsement unclaimed, it may amount to acceptance of the delivery of the notice and complaint filed may be maintainable under the Section. Similarly whether the demand notice is received back with an endorsement " refused to accept " it would amount to acceptance of the delivery of the notice and the complaint filed on that basis would be maintainable under the provisions of the Act. When there is deliberate evasion of service of notice and the same is supported by the statement of the complainant on oath as taken by the Magistrate, it would be sufficient to establish prima facie case of the complainant, and therefore, the process can be issued to

the accused. The contention, if any, that the offence is not committed till the notice under Clause (c) of the proviso is served and the drawer fails to make payment within 15 days of the said service is not correct, the commission of offence is complete as soon as the cheque is dishonoured. The period of 15 days given in Clause (c) of the proviso is just to give one more opportunity to the drawer of the cheque to escape punishment provided by Section 138 of the Act.

10. From the complaint it transpires that the respondent No.2 had sent the notice by registered post A.D. on 17-5-96 to the petitioner through his advocate, but the acknowledgment was not received served or unserved and according to the belief of the respondent No.2, the acknowledgment and the envelope was miscarried in the post. In the complaint, it is not stated that the notice dated 17-5-96 was sent to the respondent No.2 by Under Certificate of Posting. When the respondent No.2 was not available at his residence, it cannot be said that there was constructive service of notice.

11. It is not the case of the petitioner that he was aware of the sending of the first notice by the complainant and with a view to deliberately avoid the receipt of the same, he had left his residence nor it is pleaded in the complaint by the complainant that the petitioner was quite aware of the sending of the notice by the complainant and had deliberately avoided the receipt of the same. In the complaint what is pleaded is that with a view to avoid the liability to pay the amount to the complainant and other, the petitioner was absconding. However, this averment made in the complaint cannot be construed to mean that the petitioner was quite aware of the sending of the notice by the complainant and had deliberately avoided the receipt of the same.

12. However, learned counsel for the petitioner has submitted that when the notice dated 17-5-96 was duly directed and sent by post at the correct address of the petitioner, the miscarriage of the notice in post will not render the notice invalid and it will amount to constructive service of notice as per Section 94 of the Act. In support of this submission, learned counsel for the petitioner has relied on the decision of the Kerala High Court, reported in 1992 Vol. 74, Company Cases, Page 805, Mahadevan Sunil Kumar and Another v. Bhadran And Others. The facts before the Kerala High Court were that after the dishonour of the cheque, the complainant had sent the notice to the two accused. The acknowledgment in respect of the notice issued to the

first accused was not received by the complainant. A contention was raised that as the first accused had not received the notice issued under Section 138 (b) of the Act, no prosecution for the offences under Section 138 of the Act can be launched. The Kerala High Court in the above facts held that under Section 27 of the General Clauses Act, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. Under Section 94 of the Act, the mode in which the notice of dishonour may be given is mentioned. If the notice duly directed and sent by post miscarries, such miscarriage does not render the notice invalid. On the above facts, it was held by the Kerala High Court that there was proper service of notice. In my opinion, the facts of the present case cannot be compared with the facts before the Kerala High Court. In case of Mahadevan Sunil Kumar and Another (Supra), the accused had raised the contention that there was no proper service of notice and the High Court negativing the above contention held that when the notice was duly directed and sent on the correct address of the accused, there was constructive service of notice as the accused had knowledge about the service of the notice. In the present case the petitioner has not come with the averment that he was quite aware of the sending of the notice by the complainant and had deliberately avoided the receipt of the same. In the discharge application also it was never contended by the petitioner that there was constructive service of notice. It may also be stated that in the discharge application filed by the petitioner before the learned Magistrate, it was never pleaded that as the notice was miscarried in post, it should be held to be constructive service of notice.

13. Learned counsel for the petitioner in support of his contention that the notice which was sent by the complainant to the petitioner, but neither unserved notice nor the acknowledgment was received by the petitioner, the notice must be deemed to have been served, has placed reliance on the decision of the Apex Court, reported in (1997) 2 Supreme Court Cases, 637, Shimla Development Authority and Others vs. Santosh Sharma (Smt) and Another. In the case before the Apex Court, the notices were issued to the claimants under the provisions of the Land Acquisition Act were not returned unserved nor the acknowledgment cards were received and in the circumstances, it was ruled that the notices must be deemed to have been served on the claimant. The

principle laid down by the Supreme Court, in my view, will not apply to the facts of the present case. The petitioner as per the averment made in the complaint was not available at his residence, and therefore, he had no knowledge about the sending of the notice. In the facts before the Supreme Court, there were proceedings under the Land Acquisition Act and the claimant had the knowledge of the pending proceedings under the Land Acquisition Act, and therefore, in light of the above facts, it was held that when the notices were sent, but neither notices nor the acknowledgment cards were received back, it was held that the notices must be deemed to have been served. Each case has to be decided on the facts of that particular case bearing in mind the object of enacting the provisions of the sending of the notice under the Act. The petitioner in the present petition has come out with the case that there was valid service of notice on him as per the provisions of Section 27 of the General Clauses Act and the cause of action had arisen on the first service of the notice. The contention raised by the petitioner has no merits. The conjoined reading of Section 138 and 142 of the Act clearly shows that the cause of action for filing the complaint under Section 138 arises only when the drawer of the cheque fails to make the payment within fifteen days of the receipt of the notice. It cannot be said that the petitioner had knowledge of the service of the first notice, and therefore, the principles of constructive service of notice cannot be made applicable to the facts of the present case. As the petitioner was not available at his native place, there was neither actual service of notice nor constructive service of first notice on the petitioner. Hence, I am of the view that the complaint based on the service of second notice is within the time prescribed by law and cannot be quashed on the ground that it was filed beyond the period prescribed under the Act.

14. Learned counsel for the respondent has argued that in order to fasten the criminal liability, the personal service of the notice is imperative and as first notice was actually not served on the petitioner, the complaint filed on the basis of second notice is not time barred and is maintainable. When the petitioner has failed to prove the case of constructive service of first notice, I am of the view that it is not necessary for me to decide the question whether actual service of the notice is imperative and whether principle of constructive service of notice can be made applicable to notice issued under Section 138 of the Act. I have already held that the first notice was never served on

the petitioner. Neither the averments made in the petition nor the record of the case indicate that the complainant had served second notice with a view to create fresh cause of action for filing the complaint. The cause of action under Section 142 (b) of the Act arises after the receipt of the notice by the drawer and after the expiry of period of 15 days from the date of receipt of the notice. When the first notice was not received by the petitioner at all, it cannot be said that cause of action had accrued to the complainant within 15 days of the service of said notice because it was never served on the petitioner. The complainant was perfectly justified in giving the second notice and filing the complaint within the stipulated time, when the petitioner failed to make payment demanded from him within 15 days of the receipt of the notice. This, the complaint is not liable to be quashed on the ground that the complaint filed by the complainant is time barred. In my view, the learned Judicial Magistrate First Class, Idar, did not commit any illegality in rejecting the application Exh.7, in Criminal Misc. Application No.816/97, filed by the petitioner for discharge. The application, therefore, cannot be entertained and and the application is meritless and deserves to be rejected.

15. Except the abovereferredto contentions, no other contention has been raised by the learned counsel for the petitioner in support of the present application.

16. For the foregoing reasons, I do not find any substance in the application. The application fails and is dismissed. Rule discharged.

* * * *